

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS GRADY,

Plaintiff-Appellant,

v

DEPARTMENT OF STATE POLICE,

Defendant-Appellee.

UNPUBLISHED

May 26, 1998

No. 198594

Wayne Circuit Court

LC No. 96-608317 CZ

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Plaintiff, a Michigan State Police officer, appeals as of right a September 27, 1996, order dismissing plaintiff's complaint pursuant to MCR 2.116(C)(10) in this case brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.*¹ We reverse and remand.

In September 1995, plaintiff requested, in writing, a plethora of information from defendant Michigan State Police.² In November 1995, defendant responded by providing a packet of materials consisting of 295 pages and a booklet and informing plaintiff that certain information was not included because it was exempt from disclosure under MCL 15.243(1)(b)(iii); MSA 4.1801(13)(1)(b)(iii), which permits nondisclosure of investigating records compiled for law enforcement purposes to the extent that disclosure would constitute an invasion of personal privacy. Plaintiff then filed suit in circuit court, claiming a violation of the FOIA. Plaintiff alleged that defendant failed to forward a timely response to his request and acted arbitrarily and capriciously by refusing or delaying full disclosure. Defendant moved for summary disposition, alleging that by failing to properly reply to defendant's affirmative defenses and request for admissions, plaintiff admitted seeking employment information from defendant's employees' personnel files. Defendant alleged that because personnel records are exempt from disclosure under MCL 15.243(1)(b)(iii), (t)(iii) and (ix); MSA 4.1801(13)(1)(b)(iii), (t)(iii) and (ix), it was entitled to summary disposition. In response, plaintiff alleged that defendant waived any exemption under §§ 13(t)(iii) and (ix) because defendant failed to raise the exemptions as an affirmative defense or in any responses to plaintiff's complaint.

Plaintiff's counsel did not attend the hearing on defendant's motion due to illness. Without analysis or explanation, the trial court granted defendant's motion to dismiss plaintiff's complaint.

Plaintiff first argues that the trial court erred by failing to apply the procedures set forth in *Evening News Ass'n v Troy*, 417 Mich 481, 516; 339 NW2d 421 (1983) for reviewing nondisclosure of records sought under the FOIA. We agree.

When a public body denies an FOIA request, the requesting person may commence an action in circuit court to compel disclosure. MCL 15.235(7); MSA 4.1801(5)(7), MCL 15.240(1); MSA 4.1801(10) (1), *Grebner v Oakland Co Clerk*, 220 Mich App 513, 515; 560 NW2d 351 (1996). The circuit court is to determine by de novo review whether disclosure should be compelled. MCL 15.240(4); MSA 4.1801(10)(4); *Schroeder v Detroit*, 221 Mich App 364, 365; 561 NW2d 497 (1997). A public body does not waive the applicability of an exemption by failing to raise it before litigation. *Residential Ratepayer Consortium v Public Service Comm No 2*, 168 Mich App 476, 480-481; 425 NW2d 98 (1987).

In determining whether information satisfies an FOIA exemption, the court should: (1) receive a complete particularized justification for the exemption; (2) conduct a hearing in camera to determine whether justification exists; or (3) consider allowing the plaintiff's counsel access to the information in camera under a special agreement whenever possible. *Evening News, supra* at 516. The burden is on the public body to justify the exemption, MCL 15.240(4); MSA 4.1801(10)(4), *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991), and claimed exemptions must be supported by substantial justification and explanation. *Booth Newspapers, Inc v Bd of Regents of the University of Michigan*, 192 Mich App 574, 586; 481 NW2d 778 (1992), rev'd in part on other grounds 444 Mich 211; 507 NW2d 422 (1993). The court may not make conclusory or generic determinations regarding claimed exemptions, but must specifically find that particular parts of the information would be exempt for particular reasons. *Post-Newsweek Stations v Detroit*, 179 Mich App 331, 335; 445 NW2d 529 (1989).

Here, the trial court dismissed plaintiff's complaint without employing the guidelines set forth in *Evening News* to decide whether the information plaintiff requested was exempt from disclosure. There are no particularized reasons given why the claimed exemptions are appropriate, and no analysis or explanation was provided at the hearing or in the trial court's order. Accordingly, we vacate the September 27, 1996, order and remand for particularized findings of fact as to why defendant's claimed exemptions are justified.

However, if the trial court finds that plaintiff has already received the requested documents through discovery in his employment discrimination case, plaintiff's FOIA case should be dismissed. *Densmore v Dep't of Corrections*, 203 Mich App 363, 364; 512 NW2d 72 (1994). Once the records are produced the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made. *Densmore, supra* at 366.

Plaintiff next argues that defendant failed to timely respond to plaintiff's request and failed to process the request in conformity with MCL 15.233(1); MSA 4.1801(3)(1) and MCL 15.235(2);

MSA 4.1801(5)(2). We agree. Because plaintiff did not have to initiate this lawsuit to compel disclosure of the records that he has already received, however, plaintiff is unable to receive damages for defendant's delay in disclosing those records. *Michigan Council of Trout Unlimited v Michigan Dep't of Military Affairs*, 213 Mich App 203, 221; 539 NW2d 745 (1995). Therefore, the controversy with regard to those records is moot. *Densmore, supra* at 366. The delay with regard to the records not disclosed shall be addressed on remand.

Plaintiff also argues that defendant is not exempt from complying with the FOIA solely because discovery is available to plaintiff as a result of his filing of a subsequent employment discrimination case against defendant. Because plaintiff has failed to cite any authority, the issue is considered abandoned on appeal. *Speaker-Hines & Thomas, Inc v Dep't of Treasury*, 207 Mich App 84, 90; 523 NW2d 826 (1994). Further, there is no indication in the record that the trial court dismissed plaintiff's complaint on the ground that the information sought was available through discovery.

Finally, plaintiff argues that defendant should be sanctioned for willful misrepresentations that it made at the hearing on its summary disposition motion and in written filings made in the lower court. However, issues raised for the first time on appeal are not subject to review unless exceptional circumstances exist. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Such exceptional circumstances are not present here.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Donald E. Holbrook, Jr.

/s/ Mark J. Cavanagh

¹ This case was concluded before the effective date of 1996 PA 553, which amended the FOIA effective March 31, 1997. Consequently, the analysis in this opinion is based on the preamendment version of the FOIA.

² Plaintiff requested (1) Code of Conduct and all official orders defining or implementing the Code of Conduct; (2) all documentation that defines the practice, procedure, and rules of the MSP Discipline Panel and/or Appeal Board; (3) MSP/MSPTA collective bargaining agreements from January 1991 to September 18, 1995; (4) identity of all persons to whom bulletin 20-94 was sent; (5) all documents that define or detail the practice, procedure, and rules for MSP Internal Affairs; (6) all documents related to complaint against employee IA-99-93; (7) all documents related to the creation and staffing of the MSP Trooper Development Section including the names and positions filled by all those persons initially appointed or assigned to the MSP Trooper Development Section; (8) and all documents related to complaints against employee IA 067-93.